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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940.

No. 349.

E. A. KELLEAM, Nell Southard, Joe E. Kelleam, and Joe R. Southard, Jr., *Petitioners,*

vs.

MARYLAND CASUALTY COMPANY of Baltimore, Maryland, a Corporation, Mrs. Ethel Riddler, Mrs. Dorothy Payne, J. K. Perkins, Mrs. F. Bates, Glen Perkins, Bessie Mathews, Mrs. Elouise Kulp, Leggette Hall, Lamar Hall, Marguerite Bradley Kelleam, Mary Kate Hall, Kelleam Hall, Clifford Kelleam, Kathleen Kelleam, Dr. Fannin Kelleam, Francis Kelleam, Mrs. Jimmie Kelleam and Robert Kelleam, *Respondents.*

REPLY TO THE BRIEF OF RESPONDENTS ON PETITION FOR CERTIORARI.

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REPLY TO THE BRIEF OF RESPONDENTS ON PETITION FOR CERTIORARI.

STATEMENT.

Respondents evade the issues which involve questions of conflicting jurisdictions of state and federal courts.

In submitting petition and brief for certiorari a diligent effort was made to avoid statements and arguments regarding issues which were properly before the County

Court of Creek County and determined by its judgment prior to the institution of the proceeding in the national courts which is brought under review herein. The question presented for consideration in the federal court was not whether the prior judgment of the County Court conformed to the law but whether that court had in fact adjudicated the controversy in the exercise of jurisdiction vested in it under the Constitution and laws of the State of Oklahoma. Respondents in their briefs persistently ignore the question of jurisdiction upon which petitioners here rely, and the judgment of the County Court, and seek to have the case here considered upon its merits as though it had never been tried in a state court having exclusive original jurisdiction.

They studiously avoid any consideration of the final judgment of the County Court wherein that Court in proceedings initiated by the cross-respondents reviewed its own decree and refused to vacate the prior decree of distribution upon grounds of either fraud or error of law. That judgment unless vacated or set aside upon appeal (and it is conceded that the judgment has never been so set aside) determines both the law and facts of the case contrary to the very contentions respondents herein advance. It is not urged that it was irregularly or fraudulently obtained. The question now, therefore, is not as to the law or facts in the case, but whether the jurisdiction of the state court and its mandate shall be respected by the parties and the national tribunals. Analysis of the record shows clearly that the collusive effort of the surety upon the administrator's bond and the claimants who were defeated in the state courts to obtain a new adjudication of the identical controversy in the national courts is an effort merely to retry litigation theretofore conclusively determined by a court of competent jurisdiction.

The briefs filed herein may reveal some conflict in the Oklahoma authorities upon some of the questions of law before the County Court (assuming the facts there were what counsel say they were, which is not conceded), but none of the cases cited by respondents even remotely indicate that the judgment of a court is void because the court did not adopt the view of the losing side as to the law. The judgment of the County Court refusing to vacate the decree of heirship may be sustained on other wholly valid grounds than those suggested, such as laches and limitations. The statutes of Oklahoma heretofore cited by us prescribe a time within which an attack may be made upon the decree of a probate court and the procedure for such an attack. Those who fail to proceed in the time and manner prescribed are barred. The record affirmatively discloses that the complaining claimants even though not personally notified of the pending proceedings in the County Court prior to the entry of the decree of distribution, had *actual* notice of those proceedings as well as notice by publication required by statute in ample time to have asserted their claims, but did not do so. The only evidence upon the question of actual notice is that of Ethel Riddler, respondents' own witness, who testified on June 21, 1939 (R. 120):

> "My sister heard that the estate had been administered and told me. That was two years ago last October."

The date so fixed was prior to the decree of distribution. It seems proper to assume that the County Court in considering the petition to vacate gave effect to the statutory law of the state and properly concluded that any right to attack the decree of distribution had been forfeited by laches and limitations.

What is said is in no sense intended to concede charges repeated with such tedious regularity to the effect that the decree of distribution was contrary to law and obtained by fraud. As heretofore pointed out, the statutes of the State of Oklahoma did not require notice to anyone of Dr. Kelleam's petition to have himself appointed administrator of the estate; notice by publication was all that was required preceding a valid distribution. Both the law and the facts regarding the ancestral nature of the estate was submitted fully to the County Court (R. 114) and the question by it determined. Its adjudication of this question was never appealed and became final and is entitled to the same presumptions of verity and effectiveness as the judgment of any other court of general jurisdiction. Whether right or wrong, that decision became the law of this case. It was binding upon the parties in the federal court as well as in the state courts.

ARGUMENT.

I.

Respondents' contentions applied invalidate the judgment of the federal court complained of.

If it be the law that no judgment can be valid without personal as well as constructive notice, and that any judgment entered without personal notice is so wholly void that it may be brushed aside by any court in any proceeding, consideration must be given to the effect of the application of such rule in the case at bar. It is undisputed that the judgment appointing a receiver herein was entered by agreement between the respondents and without either actual or constructive notice to any of the petitioners. The decree attempts to determine the lia-

bility of Dr. E. A. Kelleam as administrator upon his official bond without ever serving process upon him or making him party in his capacity as administrator or his appearance as such. Under the terms of the bond the surety was only chargeable for his official acts. (R. 25.)

The decree in the case at bar also attempts to vacate conveyances to *Maud Grady* and *Ophelia E. Kelleam* (R. 92; 99.), who are not parties to the record, without notice to them of any kind. If the original judgment of the County Court is void for failure to give personal notice that herein complained of is void for failure to give any notice.

The surety company attempted, it admits, to compel Dr. Kelleam, whom the County Court had twice determined lawfully entitled to that portion of the estate distributed to him, to turn over that estate to some of its representatives. To punish him for treating the orders of the County Court as binding it secretly obtained the appointment of a receiver by agreement with his adversaries. It delayed issuing process for an extended period, using the receivership, in a futile attempt to coerce him into an appearance in the federal court. These observations go to the merits but seem justified in view of the frequent imputations of fraud in respondents' brief, for he who comes into a court of equity must come with clean hands.

II.

Reply to Points I to IV of Cross-Petitioners.

The cross-petitioners advance four propositions which may be briefly considered and answered:

1. That the U. S. District Court had authority to vacate the decree of the County Court.

Under this caption an attempt is made to reargue the identical propositions which were presented for adjudication of the County Court and by it determined prior to the institution of the proceedings in the federal court. Of course, none of these propositions are in point to the issues here for none of the cases involved a similar state of facts or like questions of law. The question here is whether after a case has been tried in a court of original jurisdiction and the judgment therein rendered appealed conformable to the local practice, the same issue may be tendered and determined in the national courts in an original proceeding in equity instituted there.

2. It is next argued that this suit was not an attempt by the federal court to assume jurisdiction over the matters presented in the County Court nor an attempt to review upon appeal the decision of the County Court.

This proposition merely advances questions of fact and is answered directly by consideration of the record. It is true that the proceeding was not one to review upon appeal the decision of the County Court but decidedly fallacious to say the proceeding was not designed to have the federal court assume jurisdiction over matters theretofore considered and determined by the County Court. The County Court determined the nature of the estate and identity of the heirs and ordered distribution to them and exonerated the bond; upon proceedings to vacate upon grounds of fraud it rendered judgment of dismissal which, for the purpose of this case, became final. The citation of opposing counsel to the County Court's decision upon petition to reopen is to the findings of fact and conclusions of law of the trial court (R. 85) rather than to the evidence in the record which shows without

dispute exactly what the judgment of the County Court was. (R. 143, 145, 179 and 102.) The statement in the brief of respondent-cross-petitioners at page 10, regarding the jurisdiction of the County Court, is misleading. While the County Court may not have jurisdiction to set aside conveyances or impress a lien, it did have jurisdiction though its administrator to take charge of the assets of decedent's estate and by its decree to determine to whom these belonged and order distribution. This jurisdiction it had assumed and exercised, and when these questions were determined, there was no occasion for setting aside conveyances or impressing liens by any court.

"As a general rule in the state and federal courts," say opposing counsel, "it is not the first court which takes jurisdiction of a matter that decides a case, but rather the first court reaching a ruling upon the merits which becomes *res adjudicata.*" Supporting the rule they cite *McDougal* v. *Black Panther Oil & Gas Co.*, Okla. 1921, 273 Fed. 113, and *Insurance Company* v. *Harris,* 97 U. S. 331, 336, 24 L. ed. 959.

Applying the stated rule to the facts it will be found, however, that the County Court had decided the case before institution of this cause in the federal court and these decisions support petitioners here in their contention.

Under this caption opposing counsel further contend that facts determined by the trial court and upheld by the Circuit Court will not be re-examined upon appeal, and cite *Baker* v. *Schofield,* 37 S. Ct. 333, 243 U. S. 114, 61 L. ed. 626. Analysis of the rule announced in that decision will show it qualified by the words "unless it is clear that their conclusion was erroneous." The same

qualification is recognized in *Stuart* v. *Hayden,* 169 U.S. 1, 42 L. ed. 639, 18 S. Ct. 274, which they also cite, the exact qualifying words being "unless it clearly appeared that they erred as to the effect of the evidence." The only question involved here is as to the effect of the evidence for it is not in conflict. The petitioners stood upon a demurrer to the evidence and jurisdictional defenses at the trial and the evidence as to the jurisdictional facts is not in conflict.

3. It is asserted the action was local and not *in rem* and under this caption the statement is made: "It has always been a general rule in the State of Oklahoma that a surety has a lien upon the distributed proceedings of the decedent's estate." Cited is Oklahoma Statutes Annotated, Title 12, Section 1108, which in no manner touches this point, and *Walton* v. *Williams,* 5 Okl. 642, 49 P. 1022, which involved a suit at law on a brewery employee's bond and in no manner determined a question even approximately similar to that in the case at bar. For here the question does not involve liability of the surety at all but rather jurisdiction of the national court to determine a law suit after the identical controversy had been determined by the state court.

4. It is argued under this head that there was a diversity of citizenship between the real parties in interest, but no effort is made to answer the contention that, absent proof regarding the citizenship of Kelleam Hall, there is no presumption of diversity of citizenship between the Maryland Casualty Company and him; and the further proposition that admittedly there was no diversity of citizenship between the successful and unsuccessful claimants to heirship in the County Court, who were

the real parties in interest in the proceedings in the federal court.

The surety respondent in its brief incorporates an extended recitation of what it contends the facts were in the case which the County Court adjudicated. It admits (p. 9) that on Sept. 15, 1938, the County Court sustained a demurrer to the amended petition and that the proceeding to reopen the decree of distribution was dismissed and that the case was appealed to the District Court of Creek County. The law required the appellants to prosecute this appeal to effect and without unnecessary delay and provided that unless vacated on appeal the judgment became final. It is admitted that the appeal has not been so prosecuted.

III.

Reply to Points I-III of Respondent Maryland Casualty Company.

Under point 1 the surety admits that the jurisdiction of the County Courts in probate proceedings is exclusive, original jurisdiction. An attempt is made to circumvent the proposition, however, by a counter proposition not involved in this case at all, regarding validity of a judgment of the County Court obtained by fraud. It is argued that the fraud consisted in failing to give personal notice to claimants who admit they had personal notice, in addition to notice by publication, which it is admitted was given. Then it is asserted: "No one can read the record * * * and find that the half-blood heirs had their day in court until the decision of the trial judge in the instant case."

Of course, this last statement is clearly refuted by the admission at page 9 that the half blood heirs them-

selves instituted and tried this identical law suit in the County Court. It can hardly be doubted that where notice by publication is all that is required and where they had in addition to this notice actual notice and did thereafter themselves enter their appearance in the County Court and litigate the question of the regularity of the previous judgment, they had had their day in court not once but twice, and a statement to the contrary is clearly unwarranted. They say the fraud complained of prevented a fair hearing, but no fraud is alleged or established incident to the prosecution of their own suit to vacate the judgment.

If failure to allege facts as an adversary contends they are by pleadings, and failure to give personal notice where notice by publication only is prescribed by law, constitutes fraud and invalidates a judgment absolutely, few judgments indeed rendered in the courts of the nation on constructive service can ever be upheld. Moreover, since the address of Kelleam Hall has not yet been established in the record, it is difficult to conceive how a valid judgment involving his interest can ever be obtained. Dr. Kelleam can hardly be charged with fraud in failing to do that which it appears Kelleam Hall's own counsel have not been able to do so far in this litigation. A fair inference from the circumstance that his address has not yet been established is that his counsel have not yet notified him of the pendency of this suit wherein he is nominally a party.

None of the cases cited under this caption involved circumstances such as here, nor the liability of a surety upon an administrator's bond after *two* judgments of exoneration had been entered by the very court to which

the administrator, principal upon the bond, had fully accounted.

Under point 2 the surety company lamely suggests that its appearance in the County Court may have been special. The question here is whether the surety had been exonerated by a decree of the County Court discharging the administrator and exonerating the bond. Since the liability of the surety was secondary only, and a discharge of the principal released it from any possible obligation, it is clear that the response to this point is merely begging the question. But the contention does reveal a strange reluctance on part of the surety to be exonerated.

Under their discussion of point 3, the surety quotes from *Byers* v. *McAuley,* 149 U. S. 608, 37 L. ed. 867, the following:

> "Where the estate of a deceased is ready for distribution, but no adjudication has been made as to the distributees, the Circuit Court can entertain jurisdiction in favor of citizens of other states to determine and award their shares in the estate."

And asserts: "This case is not in point and even goes so far as to hold in support of our contention." But let us see. The court limits the rule to cases where "no adjudication has been made as to the distributees."

Assuredly it cannot be contended that the County Court had made no adjudication as to the distributees in this case. And the quotation further reads: "The circuit court can entertain jurisdiction in favor of citizens of other states to determine and award their shares in the estate." But in the case at bar, the court attempted to exercise jurisdiction *where admittedly there was no*

complete diversity of citizenship between the contending claimants.

Just what counsel for the surety company contends the trial court is attempting to do is not clear, for they say it "is in no manner trying to oust the probate court of jurisdiction, or disturb the administrator in his possession as administrator." This assertion is answered by an analysis of the decree itself, which shows the federal court attempting to do identically what the probate court had already done. Frequent reference is made to the right of the federal court to deprive a party of the benefit of a decree of a state court *fraudulently* obtained. This jurisdiction is not doubted where diversity of citizenship and the jurisdictional amount invest the federal court with jurisdiction and the question of the finality and binding force of the judgment has not theretofore been determined.

They cite *Hewitt* v. *Hewitt,* 17 F. (2d) 716, to the rule that:

> "A fiduciary relation exists between an administrator and the heirs of the estate."

But again we emphasize the fact that the administrator has never been made party to the record; that they have attempted herein to obtain judgment condemning his official acts without making him in his official capacity a party. They cite many cases to the rule that the surety had an equitable claim against the property, but analysis of those cases will show none to involve similar facts. *Walton* v. *Williams,* 5 Okl. 262, 43 P. 1028, the only local case cited, as above noted involved a suit at law upon the private bond of an agent for Pabst Brewing Company of Milwaukee, Wisconsin. While it was

therein determined, in accordance with the statutes of Oklahoma, that a surety might prosecute an action to obtain indemnity against the debt or obligation for which it is bound before the debt is due and without being first paid or satisfied, this remedy is limited to cases where grounds exist upon which an order of attachment may issue. Of course, no order of attachment can issue in the case at bar after an adverse judgment upon the issues by a court having jurisdiction, for presumably that judgment is valid. That a receiver was appointed for property in the federal court at the instance of the bond company and without notice to the real parties in interest in an action where to justify, a presumption of the invalidity of two judgments of the state court was indulged, emphasizes the novel features of the case at bar.

The remaining points discussed by the surety deal with questions of residence and citizenship. It is asserted by respondent that diversity of citizenship was established to the satisfaction of the trial court. Of course the record upon the point must support the court's findings and even opposing counsel's analysis of it is convincing that the court's conclusions are contrary to the undisputed evidence. Cases heretofore cited show clearly that the federal courts have never adopted a rule that their jurisdiction may be supported by presumptions or conclusions rather than the affirmative evidence.

IV.

Conclusion.

The decree involves state and federal courts in direct conflict which this court alone can settle.

In conclusion, it is respectfully urged that this case is clearly one of an unusual nature and of general public

importance, for it involves questions not heretofore directly determined in any court, as well as conclusions directly contrary to previous adjudications of this court and other circuit courts as demonstrated by our brief. The propositions contended for by respondents and determined in their favor by the courts below will, if they receive general judicial sanction, open an avenue whereby all lawsuits pending on appeal in state tribunals may be transferred to the federal court, provided only that the requisite jurisdictional amount and a cooperative nonresident surety upon a judicial bond may be involved. The extension of bills *quia timet* in equity to situations such as that presented by the record is to be viewed with grave concern because of the absence of judicial precedent or statutory enactment governing such proceedings. If a surety upon a judicial bond may under the guise of seeking exoneration have the proceeding transferred to the federal court, and thereby invest such courts with jurisdiction to vacate decrees theretofore rendered and to probate estates, it will with equal reasonableness be argued that all other state judicial proceedings involving a surety's liability may similarly be reviewed in the national courts. Complicated and unusual incidental questions will arise: If the right exists after two judgments of exoneration in the state court, how long does it continue, and when will judgments of state courts become immune from such attacks? If the right for such review exists, when does it originate? Immediately upon the execution of the bond or thereafter? And what rules determine its period of vitality? May the remedy be resorted to again and again in every court until a judgment is obtained that conforms to the conscience or scruples or caprice of the surety? Have prior judgments no effectiveness and courts no power to finally settle such

issues as the *secondary* liability of a surety, even after they have fully "exonerated" the principal?

And the far more important question is here presented. How shall the mandates of state and federal courts divergently deciding the same issues be reconciled and made effective? Titles to valuable real and personal property depend upon which decree is valid, that of the County Court determining one set of claimants to be the heirs, or that of the federal court admitting another set to heirship. The decree of the federal court attempts to penalize the administrator by surcharging liability upon his bond for doing precisely what the court by which he was appointed and of which he was an officer directed him to do. In the circumstances only this court can correct what appears to be an obvious departure from the accepted and usual course of judicial proceedings.

It is respectfully submitted, therefore, that certiorari should issue.

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Sept. 26, 1940.